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Member of the New York Bar

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JAMES MOORE WAYNE—SOUTHERN UNIONIST

GEORGE GORDON BATTLE†

MORE than half a century ago when I was, to use the then current phrase, attending lectures at the University of Virginia, there was a fellow-student frequenting with me the lawns and the classrooms of Thomas Jefferson's famous institution. He was a young man, notably handsome, and with a charming personality. He had striking legal ability, and was a leading figure in the law courses over which Dr. John B. Minor, then Dean of the Law School, presided. He came from Savannah, and his name was George Wayne Anderson. He himself had an active and successful career at the Richmond Bar, which was unfortunately cut short by his early death.

He was the great-grandnephew of James Moore Wayne of Georgia, Justice of the Supreme Court of the United States, whose interesting and picturesque career forms the subject of this biography. I remember very well hearing Dr. Minor discuss the case of *Ex Parte Garland*,¹ in which was challenged the constitutionality of a statute requiring an oath from any person who desired to practice in the Supreme Court of the United States that he had never borne arms against the Federal Government. This Act, if enforced, would have excluded from practice in the Supreme Court practically all the members of the Bar from those States which had seceded from the Union in 1861. Augustus H. Garland, an attorney who had represented Arkansas in the Confederate Congress and was afterwards Attorney General of the United States during the administration of President Cleveland, contested the constitutionality of the statute on the ground that it inflicted an *ex post facto* penalty. The result of the decision was awaited with the keenest anxiety throughout the Southern States. Not only would the administration of justice in those States have been most injuriously affected; but the action of the Court would have been taken as an evidence of sympathy with the reconstruction statutes which were then imposing such hardships in that section. By a five-to-four decision, the Supreme Court struck down this iniquitous statute as being contrary to the Federal Constitution. This decision was supported by the vigorous and eloquent opinion of Mr. Justice Field. Professor Minor, in his lecture on this case, called attention to the fact

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1. 4 Wall. 277, 333 (U. S. 1866).

that the vote of Mr. Justice James Moore Wayne, of Georgia, was the deciding factor in the case. "Mr. Justice Wayne," said Mr. Minor, "was severely and unjustly criticized for remaining on the Bench of the Supreme Court after his native State of Georgia had seceded from the Union. His action in continuing to be a Justice of the highest Court was based upon his conscientious judgment as to his duty. Furthermore, by remaining on the Bench of that Court, he was enabled to render a very great service in the *Garland* and other similar cases to the cause of justice, as well as to his State of Georgia and the sister States that had, with Georgia, exercised what they believed to be their right of secession." Among those of us who heard this eulogy by Mr. Minor was George Wayne Anderson, the great-grandnephew of Justice Wayne. I talked with him then about his distinguished ancestor, and he told me several stories about him that had been handed down in his family. From this incident my attention was early called to the career of Mr. Justice Wayne; and I have therefore read with peculiar interest this biography, written by Mr. Alexander A. Lawrence, one of the leaders of the Savannah Bar.

Mr. Justice Wayne was a cousin of Mad Anthony Wayne, of Stony Point fame; his father, Richard Wayne, was the immigrant of the family, having come to America from Yorkshire in 1759. He was a cotton-planter and a factor who met with success in the country of his adoption. The Justice of the Supreme Court was one of his sons. A daughter married George Anderson, the president of the Planters Bank of Georgia. My friend and fellow-student at the University of Virginia, George Wayne Anderson, was a descendant of that union.

All the accounts of Mr. Justice Wayne agree that he was a man of striking appearance and of most attractive manners. He has been described by a competent observer as "a model of a cultivated and courtly gentleman." The Attorney-General under President Lincoln, Edward Bates, says of him that he was a man who "never forgets that he himself is a gentleman." Along with these personal advantages he had a character of high integrity; although in his eventful life he made decisions which were the subject of bitter criticism and even denunciation, it was universally recognized that he was actuated by lofty and patriotic motives. He was an eloquent speaker and a learned student of the law. He had also a pronounced flair for political life. He made friends wherever he went; and he found no difficulty in attaining his ambitions for place and power. He was a strong and consistent supporter of Andrew Jackson. It is well known that one of the most conspicuous traits of "Old Hickory"

was his loyal devotion to his friends. It was through his appointment that Mr. Justice Wayne became a member of our highest Court.

His early education was received from a private tutor. In 1804, at the age of 14, he became a member of the Freshman Class at Princeton; and was graduated in 1808 with the degree of Bachelor of Arts. The following year he studied law in the office of Judge Charles Chauncy of New Haven, who conducted a well known law school of that day. In 1811 he was admitted to the Bar and began the practice of law in Savannah. His talents and his industry brought him early success; and he became one of the rising members of the local Bar. He soon showed his political ambition and aptitude. In 1815 he was elected to the General Assembly of the State; in 1817 he became the Mayor of Savannah; and in 1819 he was elected to the Bench of the Court of Common Pleas and of Oyer and Terminer. Two years later he was appointed as Judge of the Superior Court for the Eastern Circuit. It was a most unusual court. It had very extensive jurisdiction and from its decisions there was apparently no appeal. In speaking of the powers of the Judge of that Court it was said by a well known jurist: "There exists no tribunal that can correct his errors or change his decrees." Three years after his appointment he was reelected to the Bench of the Superior Court by the Legislature. Mr. Justice Wayne made a fine record in the Eastern Circuit. His restless ambition, however, led him to seek successfully election to the House of Representatives at Washington; and in 1830 he took up his duties as Congressman. He plunged at once into the stormy political life of the period. He was a devoted and able adherent of Andrew Jackson and of his successor Martin Van Buren in their contests against the forces led by John C. Calhoun. He was an ardent member of the Union as against the Nullification Party. He opposed to the limit the doctrine of nullification under which the State of South Carolina was then threatening to set aside the federal tariff statutes. He voted in favor of the Force Bill supported by President Jackson, which was aimed against the nullification movement, and authorized the use of the armed forces of the Nation to collect federal revenues. He held up the hands of the doughty President in giving the death wound to the United States Bank. Mr. Lawrence says: "Throughout the struggle Wayne had been one of the heartiest fighters on the administration's firing line." Senator Benton ranked him among the "ten zealous, able, determined" members of the House who supported the President.²

2. LAWRENCE, JAMES MOORE WAYNE (1943) 72, citing 1 BENTON, THIRTY YEAR'S VIEW 401 (1854).

In the winter of 1833 he presided over the House during the heated debates of that Session. He was mentioned as a likely candidate for the United States Senate from Georgia and he was unanimously named as the nominee of the Union Party for the Governor of that State, but he declined the nomination. Throughout these busy years he showed great ability in debate, with very notable shrewdness in his political activities. President Jackson spoke of him as "true and faithful." When there came a vacancy in the Supreme Court of the United States on January 6, 1835, the President sent the name of his loyal and able supporter to the Senate for that position; and in a few days his nomination was confirmed. He then entered upon a term of service on the Bench of the highest Court of our country, which continued until his death on July 5, 1867, in the seventy-seventh year of his age. For thirty-two years, therefore, he took an active and prominent part in the consideration and the decision of the causes coming before that high tribunal which of necessity not only determines the law but to no small extent the public policy of our Government.

In considering his record as an Associate Justice of the Supreme Court, it is interesting to note that his oath of office was administered by Chief Justice Marshall; and that at the time of his death Chief Justice Chase presided over the Court. It will be seen that the term of office of Mr. Justice Wayne united the period of the Revolution with that of Reconstruction. The first cases of public importance in which he participated were those which arose during the conflict between President Jackson, on the one hand, and John C. Calhoun and Nicholas Biddle, on the other. Then came the era during which the issue of slavery became the burning question of the day. The decision by his Court in the famous *Dred Scott* case may be considered as the culmination of this era. Next came that dramatic time which preceded and included the War between the States. It was then that Mr. Justice Wayne was required to make the vital decision which was to determine whether he should follow his native State of Georgia in its secession from the Union or whether he should remain within the Union as a member of its greatest Court. He determined, as we know, upon the latter course; and the final stage in his service as a Justice was to take part in the great cases that arose during and immediately after the War. It will be seen that the Justice served in this most important and dignified position during three very critical epochs in the history of our country. No one who examines the record of his work can fail to conclude that he was an upright and able jurist, a devoted patriot, and a man of high integrity.

Before making any comment on the cases of public interest in which Mr. Justice Wayne participated after his advent to the Bench of the Supreme Court, it will be appropriate and interesting to note one case of a private character in which he was very deeply interested and which possessed many most unusual features. This was the case of Myra Clark Gaines, of which he said in his final opinion: "When, hereafter, some distinguished American shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of its Courts."³ This extraordinary litigation was still pending and undecided in the early part of 1861. At that time Mr. Justice Wayne gave as one of his reasons for continuing on the Bench the fact that his resignation would affect litigation involving important private rights and much money then pending before it. Mr. Lawrence says, in referring to this statement: "Unquestionably he was speaking of Mrs. Gaines's case."⁴ According to the facts as stated by Mr. Lawrence, Zulime Carriere was a beautiful Creole girl living in New Orleans in the early part of the nineteenth century. She was married to a shop-keeper, Jerome Des Grange. Daniel Clark, a very wealthy and prominent citizen of New Orleans, fell in love with her and there were two children born of the union although she was never divorced from Des Grange. The second of these two children was Myra Clark Gaines, the protagonist in this litigation. She was born in 1805 and was recognized by Clark as his daughter. Clark and Zulime became estranged and eventually she married another man. When Clark died in 1813 he left a Will devising his estate of some fifteen million dollars to his mother. His daughter Myra did not discover her father's identity until about 1834. She then began litigation to set aside the Will under which Clark's mother was beneficiary and to procure the estate for herself. Without attempting to state the details of this lengthy and complicated litigation it will be sufficient to note the strange and contradictory decisions rendered by the Supreme Court.⁵ In 1848 Mrs. Gaines secured a decision from that Court,⁶ in which upon the opinion rendered by Mr. Justice Wayne it was held that Mrs. Gaines was entitled to the estate. The executors, however, under the Will which we have mentioned were not parties to this suit. And when another litigation came up in the same Court in 1852, the decision was rendered this time against Mrs. Gaines

3. *Id.* at 127, citing 24 How. 553 (U. S. 1860).

4. *Id.* at 124.

5. *Id.* at 124-127.

6. *Patterson v. Gaines*, 6 How. 550 (U. S. 1848).

with a dissenting opinion covering 57 pages by Mr. Justice Wayne.⁷ Mrs. Gaines then brought forward a new claim. In 1855 she filed a petition to probate a Will claimed to have been made by her father in 1813 and subsequently lost or destroyed. The instrument itself could not be produced but witnesses testified that they had seen the Will and that it recognized Mrs. Gaines as the legitimate daughter of Mr. Clark and made her his sole legatee. This Will was finally admitted to probate and thereby the Will leaving the estate to Mr. Clark's mother was vacated; and the entire estate under this new Will went to Mrs. Gaines. Certainly Mr. Justice Wayne was justified in his opinion that this was the most remarkable case in the record of the Courts. His opinions in these three cases are well worth reading. He was consistent in his support of the claims of Mrs. Gaines. His attitude throughout showed sincerity and an overwhelming desire and determination to give what he considered to be a right and just determination of this strange controversy.

In the cases affected with a public interest the opinions of Mr. Justice Wayne show an enlightened and progressive attitude of mind. For instance, he held that the jurisdiction of the federal courts in admiralty and maritime cases was not limited and defined by the common law at the time of the adoption of the Constitution. He treated this subject in several cases, holding first,⁸ that these courts had jurisdiction over all navigable waters where the tide ebbs and flows; and later, that their jurisdiction extended even above tide-water on the Mississippi River and as far as the Great Lakes.⁹

Also in another leading case,¹⁰ the Court in an opinion written by Mr. Justice Wayne reversed a ruling by Chief Justice Marshall that a corporation could sue in the federal courts only if each of its stockholders was a citizen of a different State from the opposite party in the suit. The effect of the decision by the Chief Justice was to announce the rule that a corporation was not a citizen. In the *Letson* case in the opinion of Mr. Justice Wayne, he flatly disapproved of this doctrine, holding that a corporation, although an artificial person, may be a citizen of a particular State as much as a natural citizen. As is said by Mr. Lawrence:

7. *Gaines v. Ralf*, 12 How. 472 (U. S. 1851).

8. *Waring v. Clarke*, 5 How. 441 (U. S. 1847).

9. *The Propeller Genesee Chief*, 12 How. 443 (U. S. 1851); *Fretz v. Bull*, 12 How. 466 (U. S. 1851).

10. *Louisville Railroad Co. v. Letson*, 2 How. 497 (U. S. 1844).

"This opinion, though later modified in some of its reasoning, won for the federal courts the vast jurisdictional domain they now hold in diversity cases involving corporations as parties. From the standpoint of the legal profession and business interests of the country it is one of the most important decisions ever delivered by the Court. It was of opinions like those in the *Letson* and the *Waring* cases that Justice Campbell was thinking when he said that Wayne 'regarded the constitution and law of the country as an expanding and improving law and was willing to make a precedent to make possible the condition of the development of the country, though the letter of the constitution had not provided for the precedent.' 'No Judge on the bench,' said Campbell, 'so habitually acted on the principle of developing the law of the nation through the courts of judication.' Probably this was Wayne's greatest contribution to the jurisprudence of his day."¹¹

As we have seen, Mr. Justice Wayne had before coming on the Bench supported in the Federal Congress and elsewhere vigorously and loyally the policies of President Jackson. His opinions upon the Bench, however, showed very strikingly his judicial independence and courage. There is not sufficient space to go into the details of these cases. We can mention, however, the case of *Kendall v. United States*.¹² President Jackson had made the public assertion in a message to Congress that the Chief Executive was independent of the Supreme Court and was not controlled by its opinion on Constitutional questions. During his administration the Congress passed a statute requiring the Postmaster-General to allow certain credits to mail contractors upon claims made by the Government. Postmaster Kendall refused to follow this direction, undoubtedly at the instance of President Jackson. When a mandamus proceeding was brought against the Postmaster-General, the Attorney-General argued that the Postmaster-General was solely subject to the control of the President and that the judiciary could not interfere; and that therefore the mandamus proceeding did not lie. The Court, with Mr. Justice Wayne concurring disallowed this claim of the Attorney-General and sustained the power of the Court to enforce the mandamus proceedings. In a comment on the case Mr. Justice Wayne referred to the contention of the Attorney-General (which was also the claim of President Jackson) as being "a dangerous and unfounded doctrine."¹³ Several cases came before the Supreme Court about this time involving the power of the Supreme Court and the Federal government over commerce among the

11. JAMES MOORE WAYNE at 118.

12. 12 Pet. 524 (U. S. 1838).

13. JAMES MOORE WAYNE at 88.

States and with foreign nations, also as to the power of State legislators to revoke or impair privileges and immunities which had been granted to corporations in the past. Generally speaking, Mr. Justice Wayne in deciding these cases followed the rulings of Chief Justice Marshall although with notable exceptions.

However, the great conflict over slavery was approaching. It cast a dark shadow over our national life and institutions. Its influence was soon felt in the Supreme Court. A number of cases involving various questions in connection with slavery came up in the Courts during the decade before 1860. There had been, however, no decision on the vital question as to whether the Congress had a right in view of the constitutional provisions protecting slavery to enact statutes restricting slavery in the Territories. In the famous *Dred Scott* case¹⁴ among other issues this question raised its head. Dred Scott was a slave who had accompanied an army officer into the Louisiana territory north of the line of 36° 30' where the Missouri Compromise legislation forever prohibited slavery. He returned with his master to a slave State. He contended through his counsel that he was entitled to freedom because of his sojourn in that Louisiana territory where slavery was prohibited. His opponents claimed that the Missouri Compromise statutes which undertook to prohibit slavery in the Louisiana territory were invalid because Congress had no right under the Constitution to pass laws restricting slavery in the Territories. It was universally recognized that there were, because of this vexed question, infinite possibilities for trouble in the case. The majority of the members of the Court evidently desired to avoid the issue. At one time the Court agreed that it was unnecessary to rule on the validity of the Missouri Compromise Statutes. However, there was a motion for reargument and the matter came up again. The case was the subject of immense public interest and excitement. Two of the strongest Justices on the Bench, John McLean of Cincinnati, and Benjamin Robbins Curtis of Boston, both of them pronounced in their anti-slavery views, announced their purpose of filing dissenting opinions sustaining the validity of this Missouri Compromise legislation even though the majority of the Court did not wish to raise the question. President Buchanan was of the opinion that the public interest required a judicial decision on this important issue. He communicated his views to some of the members of the Court. Mr. Justice Wayne at a conference offered a motion "that this question should be decided by the Court and that the

14. *Dred Scott v. Sandford*, 19 How. 393 (U. S. 1856).

Chief Justice should prepare the opinion on behalf of the Court." The motion was carried. It seems to be generally believed that Mr. Justice Wayne prevailed upon Chief Justice Taney to join with him in the conclusion that there should be a decision on this question. Finally, the opinions of the Court were handed down in March 1857. Although there was some confusion on other questions six of the Justices held that the Congressional prohibition of slavery in the Territories was unconstitutional, null and void. Chief Justice Taney filed the prevailing opinion on this point. Mr. Justice Wayne unreservedly concurred with the opinion of the Chief Justice. Mr. Justice McLean and Mr. Justice Curtis dissented with strong opinions while Mr. Justice Nelson took no part in the decision because he regarded it as unnecessary to raise the question.¹⁵ As to the merits of the case the reasoning in the opinion of Chief Justice Taney has always seemed to me to be unanswerable. There is no doubt, however, that the Court made a very grave error in attempting to settle by judicial decision this political question so nearly affecting the institution of slavery. It was not necessary that this question be raised in order to decide the *Dred Scott* case. It could have been avoided. Even if it had been an essential part of the case from a judicial standpoint, the Court would have been justified in declining to pass upon it on the ground that it was a political issue. As will be seen, the Court took that position in regard to the Reconstruction legislation in the Southern States during the period immediately following the War. However, when the *Dred Scott* case came up for decision it was not generally recognized that the impending crisis over the issue of slavery was so imminent and so impelling. The members of the Court believed that its decision would be accepted by the country. But the action of the Court, as is well known, did not settle the burning issue of slavery. As former Chief Justice Charles E. Hughes has said:

"In looking at the background of the decision, it is apparent there was a fundamental error in the supposition that the imperious question which underlay the controversy could be put at rest by a judicial pronouncement."¹⁶

Chief Justice Hughes was right. The "imperious question" could be settled only by the arbitrament of war to which it was finally submitted.

Events proceeded rapidly towards the catastrophe into which the country was finally plunged. Within two years after the decision of the *Dred Scott* case a strange and interesting trial took place over which Mr. Jus-

15. JAMES MOORE WAYNE at 152-156.

16. *Id.* at 158.

tice Wayne presided in his home town of Savannah. An adventurous and reckless young man, Charles A. L. Lamar of Savannah, a member of the well-known family of that name, had engaged in a slave-trading expedition on the ship *Wanderer*, formerly a private yacht. Lamar and others were promptly indicted. The case was set for trial in the United States Court for the Fall Term at Savannah in 1859. Mr. Justice Wayne in his capacity as Circuit Judge presided over the Court. His charge although described as "lucid and impartial" was strongly against the defendants both on the law and the facts. He denounced in bitter terms the African slave trade. In the words of Mr. Lawrence:

"In an elaborate resume of the efforts of his government to break up the African slave trade he defended the constitutionality of legislation which branded it as piracy punishable by death. Concluding his charge, Wayne said: 'Having thus given you, gentlemen, the acts; and their legislative history, all of which have hitherto had the support and concurrence of the people of the United States, and by no part of the people more so, than by the people of the slave-holding States; should cases of the kind be submitted to you by the District Attorney, you will no doubt show yourselves true and faithful to the constitution and laws of our country.'"

Nevertheless, the local feeling in favor of the defendants was too strong to be overcome; and they were acquitted. Mr. Justice Wayne never again held court in Savannah.

In the meantime, Abraham Lincoln was elected to the Presidency. The States in the Far South, including Georgia, seceded from the Union and set up the Confederate Government with its capital at Montgomery, Alabama. The time came when Mr. Justice Wayne had to decide as to whether he would remain as an official under the Union on the Bench of the Supreme Court or whether he would resign from his office and return to his native State. His position was most difficult and delicate. His son to whom he was greatly devoted and for whom he had the highest respect, Henry C. Wayne, was a graduate of West Point and had been cited for his meritorious services in the Mexican War. In 1860 he held the commission of Major. He did not subscribe to the theory that the States had the right to secede. "Nevertheless," says Mr. Lawrence:

"in December the Major resigned his commission in the Army and went South to accept the newly-created post of Adjutant and Inspector General of Georgia. He was the first man, according to Governor Brown, to respond to the 'call of his State, when the dissolution of the Union was seen to be inevitable,' re-

signing 'an honorable and comfortable position in the army of the United States to cast his lot with his native land, and share her fortunes whether for weal or woe.' Brown had telegraphed, 'The State needs your services, will you come to her?' 'Under this invitation,' said Major Wayne, 'how could I hesitate? To have hesitated would have been to be recreant to my family, to the land of my birth, to my name and to my pledge to some of my friends that though not agreeing with them politically as to precipitate action, still if the State seceded her labor is service.'"¹⁸

The Justice approved of his son's course and in fact advanced him the funds with which to go South. As to his own duty, however, he took a different view. After the most careful and agonizing consideration he determined that he should not resign but should continue on the Bench under the Federal Government. In considering the reasons for his action it must be remembered that Mr. Justice Wayne had been from his early days a devoted adherent of the principles and of the party of Andrew Jackson. It is well known that President Jackson perhaps more than any man in our history had the power of impressing his opinions upon those with whom he came in contact. Undoubtedly the resolute determination with which President Jackson proclaimed and maintained that the Federal Union was indivisible and that it must be preserved, must have had a very great effect on the mind of James Moore Wayne during his early and more impressionable years. He became himself a devoted adherent of the Union; and he was equally positive in his opposition to the doctrine that the States had the right to secede. In my opinion it was this fixed principle which chiefly actuated Mr. Justice Wayne in reaching his decision. In his discussion with his son he further said that "cases might come before the Court in which it would be necessary for the South to be represented, and if the Southern judges abandoned their positions there could be no judicial voice in behalf of the South and her Constitutional rights." Also he felt an obligation to remain in the court because of the private interests involved in cases pending in that tribunal. Undoubtedly he had in his mind the case of Myra Clark Gaines among others. And so he finally reached his decision to cast his lot with the North. As he said to his son, "I expect to be misunderstood and misjudged but I shall leave posterity to do me justice."¹⁹ It is interesting to observe the action at this time of the other Judges of the Supreme Court who were of Southern birth or sympathies. There were on the Bench at that time Chief Justice Roger B. Taney of Maryland, Associate Justices

18. *Id.* at 168-169.

19. *Id.* at 170.

John Catron of Tennessee, John A. Campbell of Alabama, and James Moore Wayne of Georgia. As the State of Maryland never seceded Chief Justice Taney was not called upon to determine whether to follow his State or the Federal Government. Although he was opposed to the administration of which President Lincoln was the head, he remained on the Bench of the Court until his death in 1864. The State of Tennessee did secede but Associate Justice Catron continued on the Bench. He was 80 years of age and his decision was evidently actuated by his unwillingness to make so radical a change at his time of life. He did not have the devotion to the Union which inspired Mr. Justice Wayne. On the contrary, his sympathies were all with the seceding States. It is said that he "prayed without ceasing that the war may end and men resume their reason."²⁰ Mr. Justice Campbell before the outbreak of war became the intermediary between Secretary of State Seward and the Confederate Commissioners whom Seward would not receive directly. His efforts towards compromise were ineffectual. In view of the fact, however, that he had taken this position and because of other activities showing sympathy with the seceding States, he determined that he should resign from the Supreme Court. He did so and became Assistant Secretary of War for the Confederate States. All of his brother Judges of Southern sympathies including Mr. Justice Campbell agreed that Mr. Justice Wayne was correct in his decision not to resign. Mr. Justice Campbell states that he told Mr. Justice Wayne that he ought not to resign, "that the motives and conditions which, in my judgment, made my own resignation proper, and which conclusion I have never, for one instant, thought controvertible were not applicable to him."²¹ It is interesting to note that although, of course, the action of the Justice was unpopular in Georgia and in the other Southern States, there was little or no personal denunciation or criticism. His position was in the South ascribed largely to the fact that he had been residing in Washington for years and had lost his sympathy for his native State. In the North, on the contrary, his position was the subject of universal praise. As was said by Chief Justice Chase of Mr. Justice Wayne at his memorial exercises: "He was a most sincere and earnest patriot. It was with no common devotion that he loved his country and that Union which made his country great and honorable among the nations."²² In this connection it is to be noted that there were a number of instances in the South during

20. *Id.* at 182.21. *Id.* at 173.22. *Id.* at 184.

the War between the States in which prominent citizens adhered to the cause of the Union. Wherever it was recognized that such action was due to principle and not to expediency these men continued to enjoy the respect of their neighbors. For example, old Samuel Houston, the hero of the Battle of San Jacinto, the conqueror of Santa Ana and the first President of the Republic of Texas refused to join the Confederacy, and as a result was deposed from his office as Governor of Texas in March 1861. His disinterested patriotism was however universally recognized and until his death a few years later he enjoyed the esteem and affection of his fellow Texans.

Another like instance is to be found in the life of James Louis Petigru of South Carolina. He had been the Attorney-General of the State, United States District Attorney, and was without question the leader of the State Bar for many years. He has been described as the first citizen of the State. Like Mr. Justice Wayne, he had been a devoted follower of President Jackson and a strong advocate of the Union cause as against the doctrine of nullification. He opposed with all the strength of his great talents and energy the theory of secession. He could never approve the Confederate Government and always openly avowed his convictions. He continued, however, to stand high in the regard of the people of his City and State, because everyone knew that his position was the result of his conscientious conclusions. In this connection it is interesting to note that he had a cousin, General James Johnston Pettigrew of North Carolina, who was a gallant officer in the Confederate Army and was killed in action shortly after Gettysburg. General Pettigrew retained the Anglicized spelling of the name. Mr. James Louis Petigru originally used the same spelling, but latterly reverted to the original French form of his family name, which was of Huguenot origin.

In his opinions during the War Mr. Justice Wayne strongly supported the Union and the Administration. An interesting example is found in the case of Edward A. Stevens who enlisted in the Federal Army in 1861. He sued out a writ of habeas corpus on the ground that his enlistment was illegal and void as the President had no authority to assemble an army or Congress to sanction that action *ex post facto*. The application was presented to Wayne, said Frederick W. Seward, because while an "eminent, upright jurist, loyal to the Union," he was known to be a "firm defender of constitutional rights . . . was from Georgia, and had relatives in both armies." Stevens therefore hoped for a favorable decision."²³ Mr. Justice Wayne upheld the enlistment and sustained the

23. *Id.* at 186.

action of the President and of Congress. Mr. Lawrence says: "His terse opinion sustaining the law was printed and widely distributed and is said to have done its share of service in maintaining the Union."²⁴ During these years Chief Justice Taney was frequently absent from the Bench on account of illness and Mr. Justice Wayne as the senior Associate Justice presided over the Court. According to John M. Wallace, reporter of the Court: "with rare dignity and to universal acceptance."²⁵ Associate Justice Chase succeeded Roger B. Taney upon the death of the latter as the Chief Justice of the Court. "Arm in arm with Judge Wayne," says Mr. Lawrence, "he entered the crowded Supreme Court room on December 15, 1864, where he read the oath of office from a slip of paper handed him by Wayne. Chase would never forget the kindness with which Wayne welcomed him to the Court, 'the wisdom of his counsels, or the steadiness of his support.'"²⁶ Although his duty as he saw it required Mr. Justice Wayne to support the Union during the War his heart was always with his native State. Immediately after the surrender at Appomattox he went down to Savannah in May 1865. He was courteously received and "a friend from Charleston assured him that he would be met there 'with all personal kindness and respect.'"²⁷ It is interesting to note his untiring efforts to help his friends and neighbors and relatives in the South during these trying years. He interceded with President Lincoln and other officials in his efforts to secure pardons and other privileges for those who were in difficulties because of their adherence to the Confederate States. As a friend in Savannah said of him in regard to these activities: "This work was indeed a work of love; and shed a tender glory around his descent to the tomb."²⁸

During these last years of his life, Mr. Justice Wayne cast, as has been said, the deciding vote against the constitutionality of the test oath which would have excluded from the Supreme Court practically all lawyers in the seceding States. In the well known case of *ex parte Milligan*²⁹ the issue was as to the validity of a military commission sitting in Indiana when the civil courts were open and when there was no invasion of that State. It was claimed that the Commission was authorized by a federal statute. The Court held unanimously that under the terms of

24. *Id.* at 187.

25. *Id.* at 192.

26. *Id.* at 193.

27. *Id.* at 200.

28. *Id.* at 202.

29. 4 Wall. 2 (U. S. 1866).

that statute the Commission had no jurisdiction. However, the Court went on to hold that Congress had no power to establish a military commission under such circumstances. Mr. Justice Wayne along with the Chief Justice and two other Associate Justices, dissented from this view thus showing his strong tendency to support the Union Government.

The last important decisions of Mr. Justice Wayne were those in which he joined with all the other members of the Court in dismissing applications by the States of Mississippi and Georgia for an injunction against the Reconstruction Laws. These decisions were based on the principle that the issues were political rather than legal and that the courts under the circumstances should take no action to interfere with the President in the discharge of his duties.³⁰

During these later years his health was failing and in the words of Mr. Lawrence, "On July 5, 1867, death found him, 'in the full possession of his intellect, in perfect resignation and in the communion of the Protestant Episcopal Church.' A great concourse of citizens attended the funeral ceremonies at Washington, including the President, Chief Justice, Attorney-General, and many Congressmen and foreign representatives."³¹

In his private life Mr. Justice Wayne was happy and distinguished. In 1813 he had married Mary Johnson Campbell of Richmond, Virginia. Her father, Alexander Campbell, was in spite of his early death one of the leaders of the Bar in the State of Virginia. He was, by the way, a first cousin of the poet, Thomas Campbell. After his death his widow married a Presbyterian Minister, Dr. Henry Kollock, who went to Savannah in 1806. Mrs. Wayne was described by a contemporary as "a beautiful and an accomplished woman who was much esteemed by her acquaintances." She and her husband lived together in happiness for 54 years. They were conspicuous in the social life in Savannah and afterwards in Washington. It has been mentioned that the Chief Justice was an extremely handsome man with polished and attractive manners. He was also a man of culture both literary and artistic. He was notably kind and courteous. Particularly he was considerate and generous to the young lawyers who appeared before him. He was a man of spotless integrity and of the highest character. Mr. Lawrence ends his account of his life with these words: "Kindly and sympathetic toward the lowly and the weak, delicately observant of every propriety of social inter-

30. *Mississippi v. Johnson*, 4 Wall. 475 (U. S. 1866); *Georgia v. Stanton*, 6 Wall. 50 (U. S. 1867).

31. JAMES MOORE WAYNE at 214.

course, endowed with a sense of rectitude which permitted no deviation whatsoever—he was the very model of the true and gallant gentleman, a model to which we of our own day might well look closer in shaping our lives.”³²

In conclusion, it may be appropriate to say a word as to his ability as a Judge, and also concerning his decision to remain with the Union. In my opinion Mr. Lawrence does not do him justice as to either of these phases of his career. He says: “James Moore Wayne does not belong in the foremost ranks of the men of his time. Among contemporaries he did not pass current as either a great man or a great lawyer, and history cannot raise that evaluation.”³³ With all respect I must say that in my opinion the record of his life shows that Mr. Justice Wayne was one of the foremost men of his time; and that he was a great lawyer and a great Judge. While allowance must be made for the tendency towards eulogy in memorial addresses, Mr. Lawrence says: “Yet sincerity shines through the resolution adopted in the Supreme Court of the District of Columbia after Wayne’s death. It speaks of his ‘eminent judicial qualities, great learning, spotless integrity, keen sense of justice, and signal urbanity.’”³⁴ His colleague, Mr. Justice Campbell said of him: “He studied the causes submitted to him with fidelity and profoundness, and his decisions disclosed a capacity for close thought and cogent argument.”³⁵ Daniel Webster speaks of him as “well known to myself personally and to the public, as filling with equal honor to himself and the country the high station of an Associate Justice of the Supreme Court of the United States.”³⁶ And Mr. Lawrence says: “With the exception of Chief Justice Taney none of Wayne’s immediate contemporaries produced more opinions of importance to the profession.”³⁷

These testimonials prove that he was recognized as an able and distinguished Judge. The record of his decisions which I have attempted very briefly to indicate confirms that view. He was an able, honest, courageous and progressive Judge. Although he was in his non-judicial capacity an active and successful politician, it is conceded by all that political considerations did not influence him as a Judge. He was in the highest degree independent and impartial. Furthermore, he gave proof

32. *Id.* at 216.

33. *Id.* at 215.

34. *Id.* at 112.

35. *Id.* at 113.

36. *Id.* at 113.

37. *Id.* at 115.

throughout his life of lofty and stainless character so that he afforded the best of examples to the young men of his time. In view of these circumstances I do not think it can be justly disputed that he was a great Judge and one of the leading figures of his time. The most important act of his career was his determination to remain with the Union and upon the Bench of its Supreme Court. There can be no doubt, as I have indicated, that in reaching this decision he was actuated by the highest and most patriotic motives. That fact was universally recognized throughout the North; and even in the Southern States during the heat of the War and the Reconstruction there was little personal abuse or criticism of him. Mr. Lawrence says: "One finds it hard not to believe that the high and comfortable station he occupied at Washington, his long residence and associations there, and the resistance to change which advanced years bring were potent influences in his remaining on the Supreme Court."³⁸ I can find no evidence to justify this suggestion that personal motives actuated Mr. Justice Wayne. As a matter of fact, there were many personal reasons why it would have been easier for him to take the opposite course and to go with his State into Secession. His property was chiefly in the South. It was subsequently confiscated. As Mr. Lawrence says: "The Confederate District Court for Georgia was deluged with sequestration cases. The title of one of them was Confederate States of America v. James M. Wayne. All of the defendant's real estate, worth around fifty thousand dollars, together with his slaves, securities, effects, and credits were confiscated. On February 24, 1862, in the same dim-lit courtroom in the Custom House where he had formerly presided, a Grand Jury adjudicated Wayne as 'Alien Enemy' and sequestered his 'Lots, parts of Lots & parcels of land and also said Stocks & negro slaves.'³⁹

His own son went into the Southern army. Many of his relations and closest friends followed the same course. As he himself said, he expected to be misunderstood and misjudged. From the standpoint of his personal ease and comfort it would, as it seems to me, have been better for him to have gone with his State; but he did not do so. In this connection I may venture to say that I am a native of the State of North Carolina and my father was a Captain in the Army of the Confederate States. I have therefore every reason to scrutinize closely the grounds upon which Mr. Justice Wayne reached his momentous decision. I must

38. *Id.* at 178.

39. *Id.* at 189.

say that from a very careful study and examination I am convinced that he was actuated solely by the highest motives.

Mr. Lawrence has written a most interesting and valuable book. He deserves the gratitude of all those who are concerned with the history of our country during and after the War between the States. As he says, Mr. Justice Wayne has been a neglected figure in the annals of our country. With very great industry and intelligence Mr. Lawrence has reconstructed the career of the Justice. He has shown how great a part he played in the State and National life of his time. He has shown him to be a statesman and jurist of the highest integrity, independence and ability with an unusual and charming personality. Mr. Lawrence is to be congratulated upon the success with which he has accomplished his task.